SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5459-14T2

SOFYA REZNIK,

Plaintiff-Appellant,

v.

AMERICAN HONDA MOTOR CO., INC.
and DCH MONTCLAIR, LLC,

Defendants-Respondents.

Submitted October 17, 2016 – Decided July 13, 2017

Before Judges Fisher and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-4023-12.

Jonathan J. Sobel, attorney for appellant.

Campbell Campbell Edwards & Conroy, P.C., attorneys for respondents (William J. Conroy, Tiffany M. Alexander and Katherine A. Wang, on the brief).

PER CURIAM

Plaintiff appeals from an order dismissing with prejudice her product liability complaint against American Honda Motor Company,

Inc., and one of its dealers, DCH Montclair, LLC.[1] She also appeals from several interlocutory orders related to discovery. We reverse these interlocutory orders and the dismissal with prejudice as to Honda, but affirm the dismissal as to DCH on statute of limitations grounds.

I.

We must review in detail the procedural history that eventually led to the dismissal order. Plaintiff initially filed her complaint pro se on October 4, 2012. She named only Honda along with ten fictitious parties as defendants. She alleged that two years earlier, she suffered significant injuries because the airbag in her 2010 Acura TSX deployed with excessive force in a car accident on October 4, 2010. She contended Honda defectively designed and manufactured the airbag system.

DCH was added in an amended complaint filed a little over a year later. Plaintiff, by then represented by counsel, alleged that DCH leased the Acura to her a few months before the accident.

[1] In her pleadings, plaintiff inaccurately denominated the manufacturer as "Honda Motor Company" and the dealer as "DCH Montclair Acura." The caption has been corrected.

DCH later unsuccessfully moved to dismiss the amended complaint on statute of limitations grounds.[2]

The lawsuit proceeded in fits and starts. There were issues with service.[3] Honda did not timely respond to interrogatories and document demands.[4] Also, plaintiff's deposition was started on August 20, 2014, but not finished. The court extended the original discovery end date (DED) from August 20, 2014 to March 31, 2015, and required completion of all written discovery by October 9, 2014, party and third-party depositions by November 20, service of plaintiff's expert reports by December 31, and plaintiff's expert deposition by January 30, 2015. Defense expert

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[2] DCH filed a protective cross-appeal from that order, but abandoned it, contending instead that its statute of limitations argument provided an alternative basis for affirming the court's subsequent dismissal with prejudice. We note that four different trial judges handled this matter over the relevant period. In general, we see no need to distinguish among them.

[3] Plaintiff purported to serve Honda by causing delivery of the summons and complaint to a dealership in Wayne in April 2013. Seven months later, her counsel obtained entry of default against Honda after purporting to serve its request for entry of default by a mailing to the Wayne dealer. The dealer then contacted Honda. Honda's counsel and plaintiff entered into a consent order in December 2013 vacating the default judgment and permitting Honda to file an answer.

[4] Plaintiff served form discovery on Honda in April 2014. Plaintiff obtained an order striking Honda's answer without prejudice in July 2014 after receiving partial responses. Honda provided its full response in August and sought an order vacating the order, which was granted in October 2014.

disclosures and depositions were slated for February and March 2015. The order also barred the parties from filing motions "without first contacting the Court in writing and obtaining leave of the Court."

Despite the court's order, discovery did not proceed as planned. On November 13, 2014, DCH's counsel wrote to the court to complain that plaintiff had not appeared at three previously proposed dates for continuing her deposition. Plaintiff's counsel reportedly had adjourned the depositions, citing plaintiff's health. Defense counsel recounted that he asked plaintiff's counsel for a "medical certificate," but received none. While offering to file a formal motion, counsel asked the court to enter a proposed form of order compelling plaintiff to appear for her continued deposition on December 1 and 2, 2014. The court entered the order the next day, without requiring defendant to file a motion or indicating whether it sought or received any response from plaintiff.[5]

Then, a dispute between plaintiff and her attorney arose. On November 26, 2014, the day before Thanksgiving and five days before

[5] The order merely recited that the matter was opened by DCH's counsel and good cause for the order was shown. The order lacked a statement of reasons and an indication whether it was opposed. Cf. R. 1:6-2(a) ("The form of order shall note whether the motion was opposed or unopposed.").

the ordered deposition dates, plaintiff's counsel filed a substitution of attorney, stating plaintiff would proceed pro se. The form stated that plaintiff consented to the substitution, but plaintiff had not signed it.

Plaintiff promptly contested her counsel's submission in a letter to the court filed the same day. She denied she consented to her attorney's withdrawal. She further contended her attorney first disclosed her withdrawal as well as the court-ordered depositions in a letter she had received the previous day. Plaintiff asked the court to cancel the depositions and grant her time to find a new attorney. The record does not reflect that the court responded in any way.

Conflicting accounts of the attorney's representation of plaintiff were similarly communicated to DCH's counsel. On the same day as her substitution filing, plaintiff's counsel disclosed the substitution to DCH attorneys via email — albeit only in response to a fortuitously-timed inquiry into whether her client would attend the December 1 deposition. In her email, plaintiff's counsel responded that she could not comment on plaintiff's future appearance as she had filed the substitution of counsel earlier that day. Plaintiff's counsel also asserted she had notified her client "verbally and in writing more than once" about the

deposition dates.[6] DCH's counsel then emailed plaintiff directly to inquire if she would appear for the depositions.

Two days later, on November 28, plaintiff again relayed her version of the story to DCH's counsel via email. Her message noted, "Because my lawyer stopped representing me without my consent and without permission of the Court, I need time to obtain new counsel." She told counsel her depositions needed to be rescheduled and her new attorney would "hopefully" contact him shortly. Plaintiff thereafter did not appear for the depositions.

On December 1, 2014, DCH's counsel again wrote to the court, with a copy to plaintiff, seeking an order dismissing plaintiff's complaint without prejudice based on her failure to attend depositions. Counsel again offered to file a formal motion if the court so required. DCH's counsel provided a copy of the November 26 and November 28 emails.

On December 12, 2014, the court entered the requested order dismissing plaintiff's amended complaint without prejudice for her failure to appear at her deposition. The order again did not

[6] DCH's counsel referred to a separate letter from plaintiff's counsel, addressed to the court, which similarly disputed plaintiff's claims to the court and counsel. However, DCH chose not to include that alleged letter in the appellate record. The record also does not reflect whether the court considered it, or gave it more credence than plaintiff's version of events.

require DCH to file a motion and did not specify whether opposition was sought or received from plaintiff.

Plaintiff secured new representation. On December 22, 2014, plaintiff retained a second attorney, according to plaintiff's later-filed certification. She stated she paid $3000 and signed a retainer agreement. She understood that, after the Christmas holiday, her new attorney would file "the appropriate motions to protect . . . and represent" her.

Her choice of replacement was unfortunate. The attorney did not file a formal substitution of attorney, nor did he immediately file any motions. Notably, he was in the midst of an investigation by the Office of Attorney Ethics, which eventually resulted in a temporary suspension from the practice of law on February 20, 2015.[7]

On February 9, 2015, DCH's counsel faxed a letter to the trial court, seeking a third discovery sanction without a formal motion. This time, DCH's counsel asserted plaintiff failed to timely serve an expert report in accordance with the August case

[7] The disciplinary action followed an effort, extending back to the Spring of 2014, to conduct a demand audit of the attorney and his law firm. In a subsequent Supreme Court order, he was ordered to remain suspended for failing to cooperate with disciplinary authorities. In addition, he was later suspended for gross neglect, lack of diligence, failure to inform a client of the status of a matter, and other violations of the Rules of Professional Conduct.

management order. DCH's counsel copied the letter to plaintiff, her former counsel, and to the second attorney (although the record does not reflect how DCH's counsel learned of his involvement). Four days later, the court entered the requested order, again without requiring defendant to file a motion or noting whether the court sought or considered opposition from plaintiff. A month later, the court entered the same order, noting this time the order was "unopposed". The court provided no explanation.

On March 25, 2015, plaintiff, acting pro se, filed a motion to place the case on the inactive list. In support, she submitted the certification recounting the aforementioned struggles with her attorneys. She again asserted that her first attorney withdrew without her consent. She said she was unaware that her first attorney had adjourned a deposition scheduled for October 30, 2014, nor was she aware of the December 1 and 2 deposition dates until she received her attorney's withdrawal letter on November 25, 2014. Plaintiff also contended she paid her attorney $2500 for an expert and "thought that she had secured what she needed to present my case." She also stated that she terminated her second attorney's representation by letter after learning that he

"did nothing" to advance her case.[8] She also noted that she had not been aware of the attorney's suspension. Lastly, plaintiff stated she attached emails and reports from doctors describing serious surgery scheduled for April, which she anticipated would disable her from attending to the case until at least June 15.[9]

On May 11, 2015, the presiding judge denied plaintiff's motion. Noting the matter had 624 days of discovery, the judge wrote, "what is going on?" without addressing the facts plaintiff presented in her certification. On the same day, the judge also denied a motion, apparently filed by plaintiff's second attorney, seeking reinstatement of plaintiff's complaint.[10] The court noted the attorney had never filed a substitution of attorney and a trial date was already set.[11]

On June 9, 2015, plaintiff's third and present counsel filed a formal "substitution of counsel" signed by both counsel and

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[8] In a subsequent letter to the court in April 2015, plaintiff stated that the termination letter was dated March 9, 2015, and she had filed a fee arbitration to secure the return of her $3000.

[9] Plaintiff chose not to include those medical records in the record.

[10] The supporting papers are not before us, so it is unclear when he filed the motion papers or what they said. The proposed form of order inexplicably referred to a dismissal of plaintiff's complaint for failure to prosecute, although no such dismissal was ever ordered.

[11] An April 28 notice set trial for June 29, 2015.

plaintiff. In a series of motions, her new counsel sought orders: reinstating the complaint, extending the DED, vacating the preclusion of expert testimony, and adjourning the trial date. He filed supporting certifications of counsel and plaintiff, which recounted the facts and procedural history set forth above. In particular, plaintiff reiterated that she did not consent to her first attorney's withdrawal and that her attorney did not timely inform her of discovery deadlines and obligations. She also described her ill-fated retention of the second attorney, noting he did not inform her of his suspension.

On June 26, 2015, the trial court denied all the motions. Regarding the motion to vacate the dismissal, the court stated:

> This application is denied for a myriad of reasons. Plaintiff's attorney is not properly in the case. Attorney must file a motion. In that motion they must represent that their substituting in as new counsel will not cause a delay. Also this matter has had 624 days of discovery and there is a long list of plaintiff's failure[s] to comply with court orders regarding her discovery obligations.

In denying the motion to extend discovery, the court added that plaintiff failed to comply with Rule 4:24-1(c) or to demonstrate exceptional circumstances why she "consistently violated court orders[.]" As for the motion to vacate the order suppressing expert testimony, the court added, "Plaintiff also attempted to

have attorneys who were suspended from the practice of law engage in motion practice on her behalf."

On the day that had been set for trial, June 29, 2015, the court granted defendants' joint motion filed that same day to dismiss plaintiff's amended complaint with prejudice. In an oral statement of reasons, the judge noted that plaintiff could not meet her burden to establish liability without an expert. The judge also noted potential spoliation of evidence issues because plaintiff did not preserve the Acura involved in the accident.

On appeal, plaintiff challenges: the substitution of attorney in November 2014; the December 2014 order dismissing her complaint without prejudice; the February and March 2015 orders barring expert testimony; the June 2015 orders denying her motions to reinstate her complaint, extend discovery, allow expert testimony, and adjourn the trial date; and the June 2015 order, issued on the day of trial, dismissing the complaint with prejudice.

II.

Absent an injustice, we shall not disturb a trial court's reasoned exercise of discretion in managing discovery and its trial calendar — including decisions whether to extend deadlines, impose sanctions for discovery violations, and adjourn a trial. See, e.g., J.D. v. M.D.F., 207 N.J. 458, 480 (2011) ("Our courts have broad discretion to reject a request for an adjournment that

is ill founded or designed only to create delay . . . ."); Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011) (appellate courts apply deferential standard in reviewing trial court decisions on discovery extensions); Bender v. Adelson, 187 N.J. 411, 428 (2006) (reviewing for an abuse of discretion a "trial court's decision to bar defendants' requested amendments to their interrogatory answers [to add experts] and deny a further discovery extension"); Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 517 (1995) (stating appellate courts shall review dismissal of complaint with prejudice "for discovery misconduct" under an abuse of discretion standard and shall not interfere "unless an injustice appears to have been done"). We are mindful that, without consistent enforcement of the rules, "the efficacy of our rules is destroyed by the gradual cumulation of exceptions." Jansson v. Fairleigh Dickinson Univ., 198 N.J. Super. 190, 196 (App. Div. 1985). However, we are not obliged to defer to discovery orders that are "based on a mistaken understanding of the applicable law." Pomerantz Paper Corp., supra, 207 N.J. at 371 (internal quotation marks and citation omitted).

An abuse of discretion "arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (internal quotation

marks and citation omitted). In this case, the dismissal with prejudice of plaintiff's complaint rests on the foundation of the multiple orders that preceded it. Those prior orders suffer from several infirmities that constrain us to reverse.

In particular, three were entered in violation of the rules governing motion practice. Fundamental to the motion practice rules are the principles that the court may enter an order to a party's prejudice only upon proper notice, based upon competent evidence, and after a fair opportunity to respond. The court violated these principles in entering the three orders, in response to defense counsel's informal letters, that compelled plaintiff to attend depositions, dismissed her complaint for failing to appear at such depositions, and barred expert testimony.

The court also misapplied the rules governing the substitution and withdrawal of counsel. Specifically, the court erred in failing to review plaintiff's first counsel's withdrawal once plaintiff protested that she did so without consent, and in later concluding that plaintiff's third counsel needed defendants' consent and leave of court to appear in place of plaintiff pro se. The trial court then preserved, rather than corrected, these multiple errors in denying plaintiff's omnibus motion to restore her complaint, extend discovery, allow her to retain an expert, and adjourn trial.

Turning to the first three orders, "[a]n application to the court for an order shall be by motion," Rule 1:6-2(a) — not letters, as defense counsel utilized here. Even if we were to construe the letters as motions, they fail to meet the requirements governing motion practice in at least three respects. First, a motion "shall state the time and place when it is to be presented to the court . . . ." Ibid. Specifically, a movant must provide the other party with a notice of motion, alerting her to the return date, which is generally no sooner than sixteen days. See R. 1:6-3(a); 3 New Jersey Practice, Civil Practice Forms § 10.2, at 330 (James H. Walzer) (6th ed. 2006) ("Every motion shall state the time and place when it is to be presented to the court . . . ."). Defense counsel provided no such notice, and his letters identified no return date or other deadline by which plaintiff was obliged to respond.

Second, if the motion "relies on facts not of record or not subject of judicial notice, it shall be supported by affidavit made in compliance with R. 1:6-6." R. 1:6-2(a). Here, defense counsel supported his application by his own unsworn assertions in his letter.

Third, discovery motions in particular must be accompanied by the movant's attorney's certification that the attorney made a good faith attempt to confer orally with the attorney for the

other side, or sent a letter advising the attorney for the defaulting party that a motion would be filed. Rule 1:6-2(c). Counsel provided none. Particularly after plaintiff's first counsel withdrew, defense counsel was obliged to confer orally with plaintiff or send a warning letter directly to her, yet there is no evidence that occurred.

Furthermore, our court rules strictly limit the circumstances in which a party may secure relief ex parte. "When the rules do not provide for ex parte applications, they are prohibited, with the possible exception of extraordinary circumstances which would warrant a relaxation of the rules pursuant to R. 1:1-2." Scalza v. Shop Rite Supermarkets, Inc., 304 N.J. Super. 636, 640 (App. Div. 1997) (noting that "a motion to dismiss a complaint for failure to abide by a court order requiring more specific answers to interrogatories is not such an emergent matter"); cf. R. 4:52-1(a) and R. 4:67-2(a) (permitting ex parte applications for emergent relief).

Here, the relief provided in response to the first two letters was essentially ex parte, as plaintiff had no practical opportunity to respond. This is particularly obvious in the case of the deposition order, which the court entered the day after defense counsel requested it. The order excluding expert testimony,

entered four days after the application, was not much better. No Rule sanctions the provision of ex parte relief in this context.

Although a court has the authority in "rare case[s]" to relax the motion practice rules in cases of significant public interest, see Enourato v. N.J. Bldg. Auth., 182 N.J. Super. 58, 64-66 (App. Div. 1981), aff'd 90 N.J. 396 (1982), nothing exceptional about this case warranted disregarding motion practice rules. Nor did the court's case management order authorize the procedure here.

Perhaps most puzzling of all is the fact that the court's actions were contrary to its own order, which explicitly required the parties to seek its permission before filing motions. We need not explore whether the court was justified, absent any record of harassing or frivolous motion practice, to require leave in advance to file motions. But see Parish v. Parish, 412 N.J. Super. 39, 58 (App. Div. 2010) (stating that "enjoining the filing of motions should be considered only following a determination that the pleadings demonstrate the continuation of vexatious or harassing misuse of judicial process"). Even assuming the order was appropriate, it did not grant the parties leave to secure orders outside the motion practice rules.

While the court responded to defense counsel's informal letter applications, it failed to respond at all to plaintiff's pro se letter protesting the withdrawal of her attorney without

consent. Plaintiff's counsel needed her client's consent, or leave of court, to withdraw. See R. 1:11-2(a)(1) ("[P]rior to the fixing of a trial date in a civil action, an attorney may withdraw upon the client's consent provided a substitution of attorney is filed naming the substituted attorney or indicating that the client will appear pro se."). Counsel did not seek leave of court. She filed a substitution of attorney that conspicuously omitted plaintiff's signature indicating her consent. In response, plaintiff asserted in a letter to the court she did not give consent, and she was unaware of the deposition order.

We recognize that plaintiff's counsel allegedly disputed her client's representations in a letter submitted to the court (although the letter is not before us). Yet, counsel's reported response at most created a factual dispute that the court was obliged to resolve. Notably, plaintiff eventually supported her position with certifications. None by her counsel was submitted to the court. Thus, the court erred in failing to address the propriety of plaintiff's first counsel's withdrawal.

The prejudice plaintiff suffered as a result of this error is plain. The court's failure to examine counsel's withdrawal and alleged lack of diligence in representing plaintiff played a critical role in the orders dismissing plaintiff's complaint without prejudice and barring an expert. Plaintiff contended to

the court and defense counsel that her attorney failed to inform her of the December 1 ordered deposition in a timely manner; withdrew without consent; and left her unprepared to attend her deposition. If all that were true — and there is no competent evidence under Rule 1:6-6 to dispute it — plaintiff's failure to attend was excusable. Nonetheless, the court dismissed her complaint without prejudice for failure to attend the deposition without addressing plaintiff's reasons for doing so. The order barring plaintiff's expert was likewise tainted by the court's failure to determine whether plaintiff was abandoned and disserved by her first attorney.

The court also erred in denying the four motions filed by plaintiff's third attorney, which would have given plaintiff a chance to get her case back on track. First, the court misapplied Rule 1:11-2(a)(2) in ruling that counsel was not permitted to appear in place of plaintiff pro se. After a civil trial date is set, "an attorney may withdraw without leave of court only upon" filing: (1) the "client's written consent[] [and] a substitution of attorney" signed by both the withdrawing and entering attorneys; (2) "a written waiver by all other parties of notice and the right to be heard"; and (3) "a certification by both the withdrawing attorney and the substituted attorney that the withdrawal and substitution will not cause or result in delay." Ibid. (emphasis

added). By its plain language, the rule applies to the withdrawal of an attorney, not a self-represented party.

Moreover, the Supreme Court has expressly ordered that a substitution is not required of an attorney taking the place of a pro se party:

> Pursuant to N.J. Const. Art. VI., sec. 2 par. 3, it is ORDERED that the provisions of Rule 1:11-2 ("Withdrawal or Substitution") of the Rule Governing the Courts of the State of New Jersey are supplemented and relaxed so as to require an "attorney retained by a client who had appeared pro se" to file a Notice of Appearance, rather than a Substitution of Attorney.
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> [Notice to the Bar from Stuart Rabner, Chief Justice, Relaxation of Rule 1:11-2 to Require a Notice of Appearance Where an Attorney Initially Appears In a Matter (Feb. 20, 2015), http://njcourts.gov/notices/2015/n150227f.pdf.]

In the accompanying notice to the bar, the Acting Administrative Director of the Courts explained: "A Substitution of Attorney pleading should be used only in those situations (1) where an attorney seeks to withdraw from a matter or (2) where one attorney is being substituted for another attorney in the matter." Notice to the Bar from Glenn A. Grant, Acting Administrative Director, Superior Court of New Jersey, Relaxation of Rule 1:11-2 to Require a Notice of Appearance Where an Attorney Initially Appears In a

Matter (Feb. 20, 2015), http://njcourts.gov/notices/2015/n150227f.pdf.

The court also erred in concluding that plaintiff "attempted to have attorneys who were suspended from the practice of law engage in motion practice on her behalf." The court's reasoning presumed, without any evidential support, that plaintiff was aware of her second attorney's suspension. To the contrary, the plaintiff certified, without dispute, that she was unaware of the suspension and was victimized by that attorney's lack of diligence. Further, the court faulted plaintiff alone for the fact that discovery was incomplete, despite plaintiff's certification that she was disserved by her first and second attorneys, that the first withdrew without consent, and the second was suspended.

In its discretion, the trial court may for "good cause" grant a motion to extend discovery. R. 4:24-1. Extensions should not be mechanically denied if neither an arbitration nor trial date has been set. See Ponden v. Ponden, 374 N.J. Super. 1, 9-11 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005). After the arbitration or trial date has been set a movant must demonstrate "exceptional circumstances," R. 4:24-1, in other words, "something unusual or remarkable." Rivers v. LSC P'ship, 378 N.J. Super. 68, 78 (App. Div.) (internal quotation marks and citation omitted), certif. denied, 185 N.J. 296 (2005). A movant must demonstrate:

> (1) why discovery has not been completed within time and counsel's diligence in pursuing discovery during that time; (2) the additional discovery or disclosure sought is essential; (3) an explanation for counsel's failure to request an extension of the time for discovery within the original time period; and (4) the circumstances presented were clearly beyond the control of the attorney and litigant seeking the extension of time.
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> [Id. at 79.]

Plaintiff effectively requested an extension of discovery in March, before the DED and before the trial date was set, by requesting that the case be placed on the inactive list because of her impending surgery. Although plaintiff does not appeal the order denying that motion, we note that the court failed to address the reasons plaintiff presented, including her assertions that: her attorneys disserved her, the first withdrew without consent, and the second was suspended.

In any event, we are satisfied that plaintiff presented exceptional circumstances to justify an extension of discovery and, perforce, an adjournment of trial. We recognize an attorney's mismanagement or neglect may fall short of establishing exceptional circumstances. See Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 474 (App. Div.) (finding no exceptional circumstances where "the delay rests squarely on plaintiff's counsel's failure to retain an expert and pursue

discovery in a timely manner"), certif. granted and summarily remanded, 185 N.J. 290 (2005); Martinelli v. Farm-Rite, Inc., 345 N.J. Super. 306, 311-12 (App. Div. 2001), certif. denied, 171 N.J. 338 (2002); Rodriquez v. Luciano, 277 N.J. Super. 109, 112-13 (App. Div. 1994).

However, we have more here. Accepting plaintiff's certifications as true — as they are undisputed by any competent evidence in the form of a certification of her prior counsel to the contrary — she was disserved and then abandoned by her first attorney. When she sought the court's intervention, none was forthcoming. She diligently sought and retained new counsel, paid a fee, and anticipated that he would soon correct any deficiencies in discovery. Instead, the attorney did not formally substitute in; he apparently did little on plaintiff's behalf; and he was suspended from the practice of law and thereby disabled from representing her even if he intended to do so.

Under these circumstances, it would defeat the ends of justice to require plaintiff to suffer the consequences of her attorneys' actions. Cf. Kosmowski v. Atl. City Med. Ctr., 175 N.J. 568, 574 (2003) (stating, regarding whether to adjourn a case due to an expert's unavailability, the court must consider both "the salutary principle that the sins of the advocate should not be visited on the blameless litigant," and the court's case

management prerogatives (internal quotation marks and citation omitted)); Parker v. Marcus, 281 N.J. Super. 589, 592-95 (App. Div. 1995) (in context of Rule 4:50-1(f) motion, finding exceptional circumstances that warranted relieving party of consequences of negligent conduct of case by attorney later disbarred), certif. denied, 143 N.J. 324 (1996).

Given the foregoing conclusions, we need say little about the day-of-trial order dismissing plaintiff's complaint with prejudice. The trial judge newly assigned the case was bound by the prior orders. It was readily apparent to him, focusing on the current posture of the case, that plaintiff could not proceed to present a prima facie case, even if her complaint were restored, because she had not obtained an expert. Moreover, the trial court had previously denied her motion to extend discovery; as a result, she could not cure that deficiency. In other words, the court's order was foreordained by the preceding orders. As we reverse those orders, we reverse as well the order dismissing the complaint with prejudice as to Honda.[12] However, for the reasons set forth below, we affirm the dismissal of the complaint against DCH.

[12] We decline to affirm the dismissal order on the independent ground that plaintiff did not preserve the vehicle. Plaintiff has yet to present the report of an expert describing the nature of the alleged defect in the air bag system. Therefore, it is premature to determine the prejudice resulting from the failure

III.

In November 2013, over three years after the accident, plaintiff filed an amended complaint identifying DCH for the first time. The trial court erred in denying DCH's motion to dismiss the complaint on the ground plaintiff failed to satisfy the applicable two-year statute of limitations. See N.J.S.A. 2A:14-2. In particular, the court erred in applying Rule 4:26-4, which permits a plaintiff to sue a fictitiously named party, later amend a complaint to substitute the party's true name, and have the amended complaint "relate back" for statute of limitations purposes to the filing of the original complaint. See Greczyn v. Colgate-Palmolive, 183 N.J. 5, 17 n.3 (2005) ("Fictitious-party practice renders the initial filing against the identified but unnamed defendant timely in the first instance, subject only to diligent action by the plaintiff to insert defendant's real name."); Claypotch v. Heller, Inc., 360 N.J. Super. 472, 480 (App. Div. 2003) (stating that the amended complaint substituting the real name of a fictitiously named party is said to "relate back" to the date the complaint was originally filed).

Rule 4:26-4 provides, in relevant part:

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to preserve the vehicle. Cf. Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 118 (2008) (noting that a spoliation claim requires a showing that "the evidence was material to the litigation" (internal quotation marks and citation omitted)).

> In any action, . . . if the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification. Plaintiff shall on motion, prior to judgment, amend the complaint to state defendant's true name, such motion to be accompanied by an affidavit stating the manner in which that information was obtained.

The purpose of the rule is "to protect a diligent plaintiff who is aware of a cause of action against a defendant but not the defendant's name, at the point at which the statute of limitations is about to run." Greczyn, supra, 183 N.J. at 17-18. Upon learning the real name of a defendant, the diligent plaintiff may seek permission to file an amended complaint, specifically identifying the defendant who was previously named fictitiously. R. 4:26-4.

A plaintiff invoking fictitious party practice must satisfy four requirements. First, the plaintiff must not know the identity of the fictitiously named defendant. R. 4:26-4. Second, the fictitiously named defendant must be described with sufficient detail to allow identification. Ibid. Third, a party seeking to amend a complaint to identify a defendant previously named fictitiously must provide proof of how it learned the defendant's identity. Ibid.

Fourth, although not expressly stated in the rule, the party invoking the rule must act diligently in attempting to identify the defendant. Matynska v. Fried, 175 N.J. 51, 53 (2002); Claypotch, supra, 360 N.J. Super. at 479-80; Mears v. Sandoz Pharms., Inc., 300 N.J. Super. 622, 629 (App. Div. 1997). A showing of diligence is a threshold requirement for resort to fictitious party practice. See Matynska, supra, 175 N.J. at 53 (referring to the "due diligence threshold"); Claypotch, supra, 360 N.J. Super. at 479-80 (stating that defendant may use fictitious name "only if a defendant's true name cannot be ascertained by the exercise of due diligence prior to filing the complaint" (emphasis added)).

> If a plaintiff did not use diligence, and a court still permitted him or her to amend his or her original complaint to name a previously unknown defendant, it would not only fail to penalize delay on the plaintiff['s] part, but would also disregard considerations of essential fairness to [the] defendant[], thereby violating the purpose behind the statute of limitations.
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> [Mears, supra, 300 N.J. Super. at 630 (internal quotation marks and citation omitted).]

We recognize that the court in Claypotch held that "[i]n determining whether a plaintiff has acted with due diligence . . . a crucial factor is whether the defendant has been prejudiced by the delay . . . ." Claypotch, supra, 360 N.J. Super. at 480.

However, the absence of prejudice to defendant does not necessarily imply that plaintiff has exercised due diligence.[13] Instead, where the Court has found that a party had acted diligently, the Court considered the absence of prejudice to the defendant as a factor supporting its conclusion that allowing an amendment served the interests of justice and fairness. Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 122-23 (1973). However, "[t]here cannot be any doubt that a defendant suffers some prejudice merely by the fact that it is exposed to potential liability for a lawsuit after the statute of limitations has run." Mears, supra, 300 N.J. Super. at 631.

Applying the aforementioned requirements to the present matter, it is clear plaintiff failed to meet her burden. First, she presumably knew the name of the car dealer that leased her Acura. If she did not know its precise corporate name, she could have referred to her lease or simply asked someone at the dealership. The rule is unavailable to a plaintiff who could have

[13] While it is true that greater diligence by a plaintiff will generally result in lesser prejudice to defendant (because there will be correspondingly less delay in substituting the defendant for a fictitious party), the converse is not necessarily true. Lesser prejudice to defendant does not necessarily imply greater diligence by plaintiff. Asserting that it does is an example of "affirming the consequent" or "converse error." Prejudice may be a function of lack of diligence, but diligence is not a function of lack of prejudice.

easily identified a defendant before filing the complaint. Claypotch, supra, 360 N.J. Super. at 479-80; Mears, supra, 300 N.J. Super. at 629.

Second, she failed to describe any of the fictitious parties with sufficient detail to indicate she sought to hold the dealer liable. Certainly, she failed to allege any wrongdoing by the unnamed lessor of the vehicle instead. Instead, she described the "ABC Corporations 1-10" as follows:

> Fictitious entities who, as wholly or partially owned subsidiaries, or in partnership or combination with or under the control of the named defendant, acted purposely, intentionally, fraudulently and negligently with regard to certain duties owed to the plaintiff and in acting purposely, intentionally, fraudulently and negligently caused the plaintiff to suffer damages as are set forth herein.

The remaining factors are plainly inapplicable here: plaintiff did not provide any proof as to how she learned the dealer's identity, nor did she demonstrate that she acted diligently in identifying and naming the fictitious party.

Consequently, plaintiff was not entitled to rely on fictitious party practice to name DCH after the limitations period had run. Therefore, the court should have dismissed the complaint against DCH as time-barred. On that basis, we affirm the court's later order dismissing the complaint against DCH. See State v.

Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011) (stating the appellate court may "affirm the trial court's decision on grounds different from those relied upon by the trial court").

Affirmed in part and reversed in part. We do not retain jurisdiction.